

No. 03-16-00019-CV

**IN THE THIRD COURT OF APPEALS
AT AUSTIN, TEXAS**

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
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JEFFREY D. KYLE
Clerk

EMPOWER TEXANS, INC. AND MICHAEL QUINN SULLIVAN,

Appellants,

v.

STATE OF TEXAS ETHICS COMMISSION ET AL.,

Appellees.

On Interlocutory Appeal from the 53rd Judicial District Court,
Travis County, Texas

APPELLANTS' RESPONSE TO THE SUGGESTION OF MOOTNESS

In this civil rights case, the Commission has capitulated in part, but neither this appeal nor the underlying Section 1983 case is moot. Because there remains a live controversy, the Court should proceed with processing this appeal, including holding oral argument on September 14, 2016.

This is a civil rights case.

Empower Texans¹ filed suit against the Texas Ethics Commission and its members (collectively “TEC” or the “Commission”) under 42 U.S.C. § 1983, seeking not only to quash the Commission’s fifth round of subpoenas, but also to

¹ “Empower Texans” includes Empower Texans, Inc. and Michael Quinn Sullivan unless context dictates otherwise.

enjoin TEC’s continuing baseless investigation of Empower Texans. For more than 52 months, the TEC has maintained an investigation into Empower Texans, issuing subpoena after subpoena, refusing to rule, all in furtherance of sworn complaints that do not allege a violation of a valid law that the Ethics Commission is charged with enforcing. Empower Texans has long argued that it should not be subjected to interminable administrative harassment—government oppression and intimidation under color of law—because the Sworn Complaints at issue are not supported by any legal or factual basis. *E.g.*, (CR23–24, 3391–92); Appellant at 15–18, 25 & n.10, 30–34; Reply Br. at 9–21.

The Commission has capitulated.

Empower Texans has been arguing for years that there is no valid basis in law or fact for the Sworn Complaints at issue. Now, the Commission says that there is no basis for its subpoenas. Appellees’ Suggestion at Attachment. Furthermore, Appellees now say that “any complaint to the Commission on these facts must also be dismissed.” Appellees’ Suggestion at 2.

Empower Texans informed the Commission that there is no factual basis for its investigation or its subpoenas on:

- **April 3, 2014:** Public meeting of the Ethics Commission (RR3:PX26 at 33–34)²;
- **December 8, 2015:** E-mail from Joseph Nixon to James Davis with attached spreadsheet (RR4:DX15 at 3.);
- **December 21, 2015:** Commissioner Clancy, on cross examination at the temporary injunction hearing (RR2:148.);
- **April 8, 2016:** Appellant at 25 n.10; and,
- **August 19, 2016:** Reply Br. at 2 n.1.

In fact, the Commission attached to its own brief, filed in this Court on June 30, 2016, a copy of the very documents it now says mean the subpoena cannot be enforced and the complaints before the Commission must be dismissed. Appellee at App. a, Ex. 10 (pages 86–87 of the 91-page file-stamped PDF).

The Commission’s legal argument is no better than its factual premise. This Court has held that an organization has one principal purpose. *King Street Patriots v. Tex. Democratic Party*, 459 S.W.3d 631, 649 (Tex. App.—Austin 2014, pet. filed). This Court has also rejected the notion that, by accepting political contributions and engaging in political expenditures, a corporation morphs into a PAC. *Sylvester v. Tex. Ass’n of Bus.*, 473 S.W.3d 519, 529 (Tex. App.—Austin 2014, no pet.). The fundamental premise of *Citizens United* is that a corporation

² An audiovisual recording of this meeting is available in the Capitol Events Archives at http://tlchouse.granicus.com/MediaPlayer.php?view_id=13&clip_id=8240. The salient portion of the video begins at the 2-hour mark.

cannot be forced to form and register a PAC in order to engage in political speech, which is at the core of the First Amendment. *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310, 337–41 (2010). The Seventh Circuit rejected an argument with striking similarities to the Commission’s argument more than two years ago. *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014).

***Same Song, Sixth Verse:
The Commission’s capitulation underscores Empower Texans’ need
for injunctive relief.***

The history of this case—and the complete lack of any legal and factual basis for the Commission’s investigation—underscores Empower Texans’ need for injunctive relief. On the very day the Commission suggested to this Court that the appeal is moot, TEC Executive Director Natalia Luna Ashley was telling the *San Antonio Express-News* that the enforcement action was dismissed, but the complaints remain pending before the Commission, and that the Commission intends “to continue to use the tools that the legislature has given it to investigate complaints.”³ Combined with TEC Chairman Untermeyer’s July 2016 editorial in the *Houston Chronicle*, the Ethics Commission’s last-minute tactics are a gossamer-veiled attempt to avoid compliance with the Constitution, and to

³ David Saleh Rauf, *Ethics Agency Ends Lawsuit Seeking ‘Dark Money’ Subpoenas Against Conservative Powerbroker*, SAN ANTONIO EXPRESS-NEWS, http://www.expressnews.com/news/politics/texas_legislature/article/Ethics-agency-ends-lawsuit-seeking-dark-money-9207891.php?t=df626cf9666a5efc77&cmpid=twitter-premium (September 7 2016), attached as App. A at 4.

continue depriving Empower Texans of its settled First Amendment rights under color of state law.⁴

The TEC's filings of September 6, 2016 in Travis County District Court and September 7, 2016 in this Court repeat the established pattern in this matter. Every time Empower Texans objects to a subpoena or the ongoing investigation and proceeds to seek available legal remedies, the Commission backs down on the courthouse stairs—days or hours before a hearing or argument. Then, with the immediate crisis averted, the Commission returns with a new round of subpoenas. For example, with the hearing on the temporary injunction set for December 21, 2015 (CR3359), the Commission revised its subpoenas on December 18, 2015 (“version five”). (RR4:DX16 at 2–3.) *See also* Appellant at 4–13.

***Empower Texans and the Commission still both have
a justiciable interest in the outcome of this appeal.***

If this Court were to dismiss this appeal, the TEC would not be compelled to do anything. It could do what it has done five times over the last four years: issue more subpoenas and refuse to rule on the Sworn Complaints. Empower Texans would then be forced to defend against those subpoenas—and continue defending against the Sworn Complaints.

⁴ Chase Untermeyer, *Peeling Back the Secrecy in Texas Politics*, HOUSTON CHRONICLE, <http://www.houstonchronicle.com/opinion/outlook/article/Untermeyer-Peeling-back-the-secrecy-in-Texas-8349219.php> (July 8, 2016), attached as App.B.

Dismissing this appeal as moot would enable the TEC to continue depriving Empower Texans of its constitutional rights under color of law. The TEC's strategy is the only way the Commission can continue to harass and oppress Empower Texans. By statute, the Commission has only limited, enumerated powers; it does not possess general jurisdiction. TEX. GOV'T CODE § 571.121. Specifically, it may (1) investigate a complaint, or (2) after an appropriate vote, expand an investigation into a complaint or launch its own investigation. *Id.* Here, the Commission has not voted to expand its investigation into the Sworn Complaints or launch its own investigation.

Therefore, the only power the TEC has in this matter is to investigate the Sworn Complaints. The Commission may vote to issue subpoenas, but lacks contempt power. Instead, it must file enforcement actions in district court. TEX. GOV'T CODE § 571.137(c). Furthermore, when the Ethics Commission issues a final decision on a Sworn Complaint, the administrative respondent has a right of appeal de novo to a district court. *Id.* § 571.133. The Commission refuses to rule because, once it does, it loses power to harass Empower Texans. This is why it is significant that the TEC told the *San Antonio Express-News* yesterday that the subpoena was withdrawn but the complaints were not dismissed. App. A at 4.

Empower Texans has been asking the Texas Ethics Commission ("TEC" or "Commission") to rule on Sworn Complaints 3120485 and 3120486 for years. The

cat-and-mouse game has continued, and the TEC's recent filings are little more than its attempt to play another round. It must stop, and only "a court of competent jurisdiction" can stop it. App. B at 4.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accord with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned attorney hereby certifies that the foregoing document contains 1,247 words, excluding those portions permitted by TEX. R. APP. P. 9.4(i)(1). The aggregate number of words contained in Appellants' merits-related filings in this Court is 15,189 words.

The undersigned further certifies that this document has been prepared using a typeface of no smaller than 14-point except for footnotes, which are 12-point.

/s/ Nicholas D. Stepp
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via e-filing or facsimile to the following counsel on September 8, 2016:

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Appendix A

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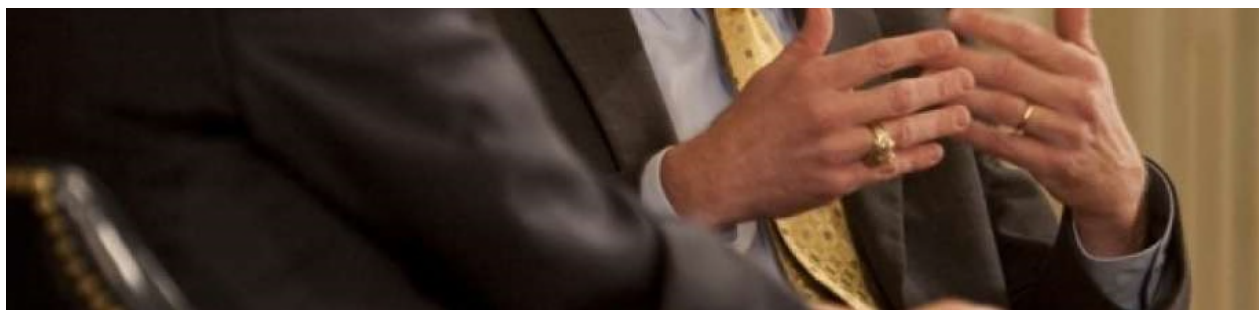
Ethics agency ends lawsuit seeking 'dark money' subpoenas against conservative powerbroker

MQS subpoena saga in ethics investigation possibly nearing an end

By **David Saleh Rauf** | September 7, 2016 | Updated: September 7, 2016 9:02pm

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TribLive event with Michael Quinn Sullivan, president and CEO of Empower Texans and Texans for Fiscal Responsibility. Photo courtesy of Texas Tribune.

AUSTIN — The Texas Ethics Commission is backing off a long-running battle to force conservative powerbroker Michael Quinn Sullivan to comply with subpoenas as part of an investigation into his nonprofit's political activity.

Attorney General Ken Paxton's office, which is representing the commission, told a state district judge in Travis County on Tuesday that the campaign finance regulator is no longer seeking the court's backing to enforce subpoenas against Sullivan or his 501(c)4 nonprofit, Empower Texans.



The subpoenas are part of a "dark money" investigation launched in 2012 by the ethics commission into the campaign finance activity of Empower Texans. The group is allowed to make independent expenditures without having to disclose donors.

State regulators are investigating whether the nonprofit has coordinated with donors to accept or spend money to influence a state election and if it should have to register as a political action committee, which is required to release donor names.

The case also presents precarious optics for Paxton: his office has been defending state-issued subpoenas against a politically active nonprofit with vast clout in tea party circles and whose political arm contributed a total of \$375,000 and guaranteed a \$1 million loan for his attorney general campaign.

Sullivan, a prominent anti-tax and limited-government activist, had unsuccessfully tried to quash the commission's document demand in federal and state courts since first being issued in February of 2014. Accusing Sullivan of stonewalling the state's investigation, the commission filed a lawsuit last year asking a Travis County judge to enforce the subpoenas.

That request for the court to intervene, however, is now "moot," according to the commission's notice of nonsuit. Sullivan and Empower Texans, the attorney general's office says in a filing, made a "judicial admission" last month in a footnote of a related case saying the group raised \$375 online during a period when a set of emails were sent that included a donate button. Those emails are the focus of the sworn complaints that prompted the commission's investigation.

The amount falls below the \$500 threshold required under state law for a group to register as a PAC, which Sullivan's lawyers wrote in a filing is tantamount to "conclusive evidence that Empower Texans did not violate the Election Code."

"We told them it was less than \$500 in 2014," said Trey Trainor, a lawyer for Sullivan and Empower Texans. "The footnote isn't a big revelation. It's an attempt to save face by the ethics commission to say 'we are just discovering this.'"

Natalia Luna Ashley, the commission's executive director, said the investigation into Sullivan and Empower Texans is still pending despite the agency dropping its subpoena lawsuit.

"The commission is going to continue to use the tools that the legislature has given to it to investigate complaints and enforce the laws ... in order to promote the public's trust in government," she said.

The move to dismiss the subpoena lawsuit marks an unexpected twist in the case, as the document demand has become a central issue in the commission's investigation. The commission has argued it cannot move forward without the documents and even accused Sullivan of destroying files after the subpoenas were first released.

And the issue has also continued to play out publicly: it's become somewhat of a ritual at commission meetings for Sullivan's lawyers and regulators to trade tongue lashings about the investigation and subpoenas (that's actually how the commission spent the first 20 minutes of its August meeting – **watch here**).

At one point, the commission was seeking the release of a wide range of documents from Sullivan and Empower Texans, including communications with donors, lawmakers and members of the state's executive branch, with the redaction of names. They also included "time records, calendars and diaries maintained by or for" Sullivan, along with two other employees of Empower Texans.

A federal judge in 2014 called the subpoenas "absurd," but refused to quash them. Negotiations have followed since then and several different versions of the subpoenas have been crafted, though Empower Texans argues the document demands are still too broad and the commission's investigation amounts to government intimidation.

In court filings, Paxton's office had vigorously defended the commission's power to execute subpoenas to investigate campaign finance matters. Last year, the attorney general's office in a court filing accused Empower Texans and Sullivan of "thwarting TEC's attempts to investigate (and potentially dismiss) the sworn complaints at issue because, ultimately, plaintiffs do not believe they have to comply with TEC's lawful power to investigate sworn complaints."

But Paxton's legal team over that time frame has also continually narrowed the scope of the commission's document demand.

At a court hearing in December, a lawyer for the attorney general's office told a judge in Travis County the scope of the commission's subpoenas had been whittled down to seek only minimal information "to measure how much money came in for a regulated activity."

In June, according to court filings, Paxton's office told Sullivan and Empower Texans in a related case they could satisfy what's being asked for in the subpoenas by simply affirming that there is no additional information to disclose or that the total amount of funds the groups raised was less than \$500.

"Either response would preclude further proceedings under the filed complaint," the attorney general's office wrote.

The involvement of the attorney general's office in the subpoena lawsuit involving Sullivan is notable not only because of Paxton's close ties to Empower Texans.

Despite taking an active role in the ethics commission's legal sparring with Sullivan previously, the state campaign finance regulator sidelined the attorney general's office in its legal fights with the conservative activist in a separate case. The commission hired prominent Houston-based law firm Beck Redden for court action stemming from a \$10,000 fine issued to Sullivan as part of an investigation that determined he violated state law by failing to register as a lobbyist. Sullivan's appeal is pending.

The attorney general's office did not immediately respond to a request for comment.

Anthony Gutierrez, executive director of Common Cause Texas, which works to strengthen ethics laws, said Paxton's office was right the first time when it argued a year ago that the documents being subpoenaed were needed in order for the TEC to make a final ruling in this case.

"This sudden about-face reeks of impropriety," he said, "and perhaps the worst part is that we may never get to the bottom of it all because the ethics commission lacks the powers it needs to do its job."



David Saleh Rauf

Staff Writer | San
Antonio Express-

News

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Appendix B

OUTLOOK

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Untermeyer: Peeling back the secrecy in Texas politics

By Chase Untermeyer | July 8, 2016

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Photo: CHRISTOBAL PEREZ, STF

State Capitol image on the day Rep. Tom Craddick is voted in by members as House Speaker, Tuesday, January 14, 2003 at the State Capitol in Austin. Rep. Craddick is a Republican from Midland and the longest-serving member of the Texas House of Representatives. It's the first time a Republican has held office in 130 years. CHRISTOBAL PEREZ/HOUSTON CHRONICLE

It may have been unique in the long history of our state - it certainly was odd - but I asked to be appointed to the Texas Ethics Commission. As the regulator of non-federal political campaigns and lobbying in Texas, the Commission has always been a hot seat.

Perhaps more astonished than anything else, Speaker of the House Joe Straus made me one of his two appointees to the Ethics Commission early in 2010. The lieutenant governor also names two members and the governor names four. Under the state constitutional amendment that created the Commission in 1991, both major parties are represented and represented equally.



I sought appointment to the Commission after being subject to both state and federal ethics laws over a 35-year period. Ethical behavior is certainly expected of those who hold a public trust, and the laws were warranted. My complaint was that "ethics" in government had become bureaucratized, no longer a matter of proper behavior but of correctly and timely filling out official forms.

Indeed, the body I joined in Austin six-plus years ago had become what I called the Perfect Paperwork Commission. We would spend great amounts of time deciding what to fine someone who was an hour late in filing a campaign report or who had not stated the purpose of an \$11.89 expenditure at the post office.

These petty deliberations and determinations gave rise to a

OPINION

justifiable criticism that the Ethics Commission was "going after the minnows and not the sharks." Our former chairman, Jim Clancy, a Corpus Christi attorney, laboriously drafted charts on what (if anything) to fine people for the ordinary human acts of omission, ignorance, or forgetfulness. This freed the Commission to focus on significant cases involving alleged sharks.

Another former chairman, Paul W. Hobby of Houston, calls the Ethics Commission "the disclosure agency." State law does not limit the amount of money that candidates may receive and spend - nor should it. In the absence of such limits, knowing who gives money in politics and how it is spent is the best tool the public and the press have to weigh candidates and referenda. We on the commission, without a dissenter, defend this principle every time we meet.

Some groups allege that disclosure is an infringement of the First Amendment's guarantee of free speech and the right to petition government for "a redress of grievances." They claim that donors could be subject to harassment if their names are made public, and they cite a 1958 decision of the U.S. Supreme Court that protected members of the Alabama NAACP from having their names revealed.

But it is ludicrous to compare some of our state's richest and most influential political players with the truly endangered members of the Alabama NAACP in the era of segregation. They simply don't want us to know who they are and whom they are supporting.



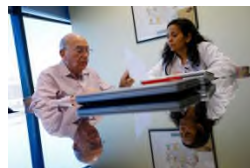
Parker: How can there be 'news' without newspapers?



Tuesday letters: Zika, Brexit, VA, Supreme Court's abortion



Opinion: Clinton's server doesn't look like honest mistake



Thursday letters: Planning ahead



The danger of President Trump isn't dictatorship

One day a court of competent jurisdiction may sympathize with these bashful billionaires and throw out the disclosure laws enforced by the Texas Ethics Commission. Until that day, we shall fulfill our sworn duty to uphold those laws and pursue violators to the extent we are able.

If an organization sincerely believes that the constitutional rights of all Texans are being violated - and is not merely seeking to mask its wealthy donors - it should try to change the laws. But lawmakers should not be beguiled or cajoled into weakening the state's ethics laws on such spurious grounds. They should know they would be - and should be held accountable for - pulling an invisibility cloak over the politics of our state.

It is a very good thing that nearly all the current members of the Texas Ethics Commission have themselves been candidates for public office. We know what it's like to live under the laws we enforce. And in that enforcement we aim to encourage greater, not lesser, participation in politics at all levels.

Untermeyer, a Houston businessman, currently chairs the Texas Ethics Commission.

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